

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 1:18:CR:242

DEVIN DEVON-MOORE LEWIS,

HON. GORDON J. QUIST

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER DENYING MOTION TO SUPPRESS**

Defendant, Devin Devon-Moore Lewis, has been charged in a superseding indictment with possession with intent to distribute methamphetamine and marijuana, in violation of 21 U.S.C. § 841; felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); possession and brandishing of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c); and possession of a stolen firearm, in violation of 18 U.S.C. § 922(j). (ECF No. 23.) Lewis moves to suppress evidence seized from his encounter with Officer Nicholas Oliver of the Kalamazoo Department of Public Safety (KDPS). (ECF No. 21.) Lewis argues that Officer Oliver seized him when Officer Oliver first confronted Lewis and his companion, Amber French. According to Lewis, at that point in time, Officer Oliver lacked reasonable suspicion to detain Lewis, and thus the subsequent frisk also lacked reasonable suspicion.

The government counters that Officer Oliver's interaction with Lewis and French began as a consensual encounter, and it was only later—after Lewis dropped a small item that Officer Oliver suspected to be drugs—that Officer Oliver detained Lewis. The government maintains that, in

addition to the reasonable suspicion for detention, Officer Oliver had reasonable suspicion that Lewis was armed and dangerous, justifying the frisk.

The Court held an evidentiary hearing on March 28, 2019, during which it received testimony from Officer Oliver and watched the bodycam footage from the incident. The Court also heard argument from counsel. For the reasons set forth below, Lewis's motion to suppress will be denied.

I. FINDINGS OF FACT

Shortly after 10:30 p.m. on October 9, 2018, Officer Oliver was driving his patrol car through a neighborhood with high rates of drug-dealing and gun violence. Officer Oliver passed a public alley where he saw "two kids walking in the alley." The alley connected Race and Portage Streets in Kalamazoo, and KDPS had received several complaints of trespassing and theft from residents of the houses on either side of the alley. Accordingly, Officer Oliver decided to investigate and drove to the other end of the alley to meet the two individuals.

Officer Oliver parked his patrol car in the alley, got out of the car to address the two individuals, shone his flashlight toward them, and asked, "Hey guys, can I talk to you real quick?" Officer Oliver immediately recognized one of the people as French, a known meth-user and "picker" (someone who trespasses on the property of others and takes items of value from those properties). Lewis was standing a few yards behind French and had one hand in his right jacket pocket. In a casual tone, Officer Oliver asked Lewis to keep his hands out of his pockets with which Lewis complied. After Lewis removed his hand from his pocket, he briefly patted that area, which Officer Oliver perceived as Lewis checking to make sure he still had a firearm.

Officer Oliver began chatting with French about an encounter Officer Oliver had with French's boyfriend the week before and offered to check if French had any outstanding warrants,

letting her know that he would let her go if any open warrants were minor but would take her in if she had an open felony warrant. French agreed to have Officer Oliver check. French had no open warrants.

While Officer Oliver was talking to French, he watched Lewis reach behind his left ear. A small white object fell to Lewis's shoulder, and Lewis brushed the item to the ground. Officer Oliver suspected the item to be drugs because of the way that Lewis discarded the item and Lewis's association with French. Officer Oliver quietly requested a backup officer.

At the hearing on the motion to suppress, Officer Oliver testified that after he saw Lewis discard the small white item, he planned to detain Lewis but wanted a backup officer because he suspected that Lewis also had a weapon. Officer Oliver noticed that Lewis had a bulge at his right waistband, in the same area where Lewis had patted earlier, and Lewis's shirt was caught up on an object on his right waistband. Lewis also kept his right side somewhat obscured from Officer Oliver's view, which Officer Oliver perceived as a tactic called "blading," in which a person stands in a position to disguise and allow quick access to a handgun.

Officer Oliver asked French who was "her buddy." French responded that Lewis was a friend. Officer Oliver asked for Lewis's name, and Lewis responded, "Duke." Officer Oliver then went back to chatting with French. Officer Oliver asked French if she was carrying firearms or any other contraband. French showed Officer Oliver a closed pint of alcohol she had in her waistband and various items she had in her pockets, but no contraband. During Officer Oliver's conversation with French, Lewis stood still nearby.

Officer Oliver then turned to Lewis and asked for his "real name," and Lewis asked, "Why does this concern me at all?" Officer Oliver answered that he liked to make contact with people walking in alleys because a lot of crime happens in alleys and that he liked to get acquainted with

people in the neighborhood that he patrolled. Lewis gave Officer Oliver the name “Devon Moore,” and Officer Oliver offered to run a warrant check for Lewis with the same parameters that he had offered French—to let him go as long as the warrant was not for a felony. Lewis appeared to consent to a warrant check. Officer Oliver asked, “While we’re waiting, you don’t have any weapons or anything on you?” Lewis shook his head to indicate that he did not. Officer Oliver articulated that he was worried about a weapon because he could see “something bulky” on Lewis’s right hip. Officer Oliver then said, “I’m just going to ask, can you not reach for that area?” and Lewis agreed. Officer Oliver asked if he could pat-down that area, but Lewis made it clear that he did not consent to being patted down.

At that point, the backup officer, KDPS Officer Greg Day, arrived from the opposite end of the alley. Officer Oliver requested that Lewis set his backpack on the ground, and Lewis complied. Officer Oliver grasped Lewis’s right wrist and Officer Day grasped Lewis’s left wrist to pat down Lewis. Officer Oliver told Lewis that he was not under arrest but that Officer Oliver was nervous that Lewis would pull a gun on the officers. Lewis then broke free from Officer Oliver’s grasp and swung his fist toward Officer Oliver’s face. The two officers eventually subdued Lewis, and placed him under arrest for resisting and obstructing. In searching Lewis, the officers found a loaded handgun in Lewis’s right waistband, as well as drugs and drug paraphernalia in the backpack he was carrying. The small white item was recovered and found a partially-smoked marijuana joint.

II. CONCLUSIONS OF LAW

The parties first dispute when a seizure occurred for the purposes of Fourth Amendment protection. “The Supreme Court has identified three types of reasonable, and thus permissible, warrantless encounters between the police and citizens: (1) consensual encounters in which contact

is initiated by a police officer without any articulable reason whatsoever and the citizen is briefly asked questions; (2) a temporary involuntary detention or *Terry* stop which must be predicated upon reasonable suspicion; and (3) arrests which must be based upon probable cause.” *United States v. Pearce*, 531 F.3d 374, 380 (6th Cir. 2008) (internal quotation marks omitted).

Lewis argues that he was detained as soon as the encounter in the alley began and that Officer Oliver lacked reasonable suspicion at that point. The government maintains that the encounter began as a consensual encounter and it was only later, when Officer Oliver grasped Lewis’s wrists to conduct the frisk, that Lewis was detained.

“A person is seized when an officer by means of physical force or show of authority, has in some way restrained his liberty, such that in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,” and the “individual must actually yield to the show of authority.” *United States v. Johnson*, 620 F.3d 685, 690 (6th Cir. 2010) (internal quotation marks, citations, and alterations omitted). But it should be noted, the Supreme Court has “held repeatedly that mere police questioning does not constitute a seizure.” *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991). “[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual’s identification; and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required.” *Id.* at 434–35, 111 S. Ct. at 2386 (internal citations omitted). The Supreme Court has provided examples of circumstances that might indicate a seizure: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request

might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980); *United States v. Campbell*, 486 F.3d 949, 954 (6th Cir. 2007).

Here, Officer Oliver was the only officer present when he first encountered French and Lewis in the alley. Officer Oliver was dressed in full police uniform and carried his weapon, but he did not display his weapon. Officer Oliver did not touch Lewis prior to grasping his wrist, and that occurred after the backup officer arrived. Officer Oliver spoke in a very casual and non-threatening tone, directing the vast majority of his questions and conversation toward French rather than Lewis.

Lewis argues that the seizure occurred at the beginning of the encounter because Officer Oliver blocked the alley with his patrol car, requiring Lewis to stop walking. However, Officer Oliver testified that there was room on both sides of the patrol vehicle for Lewis to continue walking past Officer Oliver. Moreover, the bodycam footage shows that until Officer Day arrived, Lewis had a clear path to exit the other end of the alley and could walk past the police vehicles headed in the same direction. “The fact that [Lewis] stopped walking to respond to [Officer Oliver]’s inquiry also does not, by itself, transform this encounter into a seizure for purposes of the Fourth Amendment.” *O’Malley v. City of Flint*, 652 F.3d 662, 669 (6th Cir. 2011). Thus, the Court disagrees with Lewis that a seizure occurred when the encounter began.

However, the Court also disagrees with the government that a seizure did not occur until Officer Oliver grasped Lewis’s wrist. At the same time that Officer Day arrived, at least partially blocking the other end of the alley, Officer Oliver moved several steps closer to Lewis and used a more commanding tone. The combination of the change in tone, the presence of multiple officers, and the closing off of what had previously been a clear route of exit resulted in a situation in which

a reasonable person would no longer feel free to leave. Thus, that was the point that Lewis was seized for the purposes of Fourth Amendment protection.

The parties next dispute whether Officer Oliver had reasonable suspicion to justify a *Terry*¹ stop. To justify an investigatory stop, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the stop. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). “[S]imple good faith on the part of the arresting officer is not enough.” *Id.* at 22, 88 S. Ct. at 1880 (internal quotation marks omitted). Stated differently, “an officer may conduct an investigatory stop only if he has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.” *Johnson*, 620 F.3d at 692 (internal quotation marks omitted).

“The determination of whether reasonable suspicion existed must be based on a totality of the circumstances in place at the time of seizure.” *Id.* The totality-of-the-circumstances approach “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” *United States v. Pearce*, 531 F.3d 374, 380 (6th Cir. 2008) (internal quotation marks omitted). “While an officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity in order to justify a [sic] investigatory stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *Id.* (internal quotation marks and citations omitted).

Officer Oliver made the following observations prior to detaining Lewis: Two figures were walking down an alley in a high-crime area at night. Officer Oliver thought he saw one of the

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

individuals trespassing on private property adjacent to the alley. Trespassing and thefts regularly occurred in that alley. Officer Oliver recognized one of the two individuals as French, a known methamphetamine user and “picker.” While Officer Oliver was talking to French, he observed Lewis pulling a small item from behind his ear, letting it fall unto his collar, and then brushing it to the ground. In Officer Oliver’s experience, that method of discarding an item is characteristic of someone trying to “clean” themselves of contraband once confronted by police. Additionally, French was known to associate with other drug users, and there were multiple indicators that Lewis was carrying a weapon. Based on the totality of the circumstances, Officer Oliver had reasonable, articulable suspicion that Lewis had been, was, or was going to be engaging in criminal activity.

Finally, the parties dispute whether reasonable suspicion justified the frisk. “A reviewing court must analyze a frisk separately from an initial stop, applying a slightly different standard to determine whether the frisk was lawful.” *United States v. Williams*, 731 F.3d 678, 686 (7th Cir. 2013). “[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.” *Arizona v. Johnson*, 555 U.S. 323, 326–27, 129 S. Ct. 781, 784 (2009).

Here, Officer Oliver had reasonable suspicion to believe that Lewis was carrying a weapon. Officer Oliver saw Lewis pat his right pocket and turn his right side away from Officer Oliver in a stance that Officer Oliver recognized as “blading” (standing in a manner to conceal and have easy access to a firearm). Officer Oliver noticed “something bulky” in Lewis’s waistband and that Lewis’s shirt was caught on an object in that area. Officer Oliver even articulated his concerns and observations to Lewis during the encounter. After observing Lewis discard the small object that Officer Oliver suspected to be drugs, Officer Oliver further suspected that Lewis might be carrying a weapon.

The Supreme Court concluded in *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 334 (1977), that a “bulge in the jacket permitted the officer to conclude that [the defendant] was armed and thus posed a serious and present danger to the safety of the officer,” such that a frisk was warranted. Here, Officer Oliver saw a bulge in Lewis’s waistband and had additional information that gave him reasonable suspicion that Lewis was armed and dangerous.

Lewis points to an unpublished Sixth Circuit case that affirmed the grant of a motion to suppress even though police officers stated that there was a bulge in the defendant’s pocket in the shape of a gun and that the weight and swing of the gun had a characteristic “pendulum effect.” *United States v. Davis*, 554 F. App’x 485, 487 (6th Cir. 2014). However, *Davis* is inapposite to the instant case for two reasons. First, the issue in *Davis* was whether the police had reasonable suspicion to make a *Terry* stop in the first place, not whether the police were entitled to conduct a frisk during a lawful *Terry* stop. Second, the holding in *Davis* relied heavily on the district court’s finding that the officers’ testimony was unconvincing, speculative, and incredible. *Id.* at 489. Thus, *Davis* does not alter the general rule in *Mimms* that the police have reasonable suspicion to conduct a pat-down based on a bulge in a defendant’s clothing that is consistent with a firearm.

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Lewis’s Motion to Suppress (ECF No. 21) is **DENIED**.

Dated: April 5, 2019

/s/ Gordon J. Quist

GORDON J. QUIST
UNITED STATES DISTRICT JUDGE